Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

Mesa Airlines, Inc. and
WestAir Commuter Airlines, Inc.,
Petitioners,

v.

United Airlines, Inc. and SkyWest Airlines, Inc.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Two regional airlines entered into voluntary partnership agreements with a third airline, a major carrier, concerning the providing of regional air service to and from various cities. A fourth airline tortiously interfered with those agreements. The questions presented are:

1. Did the Court of Appeals err in holding that the Airline Deregulation Act of 1978 ("ADA") preempted claims by the two airlines against their partner for: (i) breach of fiduciary duty, and (ii) fraud in the inducement?

2. Did the Court of Appeals err in holding that the ADA preempted a claim by the two airlines against the fourth for tortious interference with contract?

3. Did the Court of Appeals err in refusing to analyze the ADA's preemption provision in a manner consistent with this Court's recent decisions regarding the similar preemption provision in ERISA?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of this case. Petitioner Mesa Airlines, Inc. ("Mesa") is a publicly traded corporation. Petitioner WestAir Commuter Airlines, Inc. ("WestAir") is a wholly owned subsidiary of Mesa.

Pursuant to Supreme Court Rules 14.1(b) and 29.6, Petitioners state that "Mesa Air Group" is a publicly held company owning 10% or more of Mesa Airlines' stock.

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United Airlines, Inc., and SkyWest Airlines, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Mesa and WestAir respectfully petition for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals which held that Petitioners' tort claims were preempted by § 105(a)(1) (recodified in 1994 at § 41713(b)(1)) of the ADA.

OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1a-15a) is reported at *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000). The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division (App. 16a-19a), certifying its August 6, 1999 order for interlocutory appeal under 28 U.S.C. § 1292(b), is reported at *United Airlines, Inc. v.*

Mesa Airlines, Inc., 1999 WL 1144962 (N.D. Ill. Oct. 5, 1999).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 5, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 49 U.S.C. § 41713(b)(1) (the "preemption clause") of the ADA (as recodified in 1994 and amended) (formerly codified at 49 U.S.C. App. § 1305(a)(1)) states in relevant part:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

2. 49 U.S.C. § 40120(c) (the "savings clause") of the ADA states in relevant part: "A remedy under this part is in addition to any other remedies provided by law."

(Formerly codified at 49 U.S.C. App. § 1506.)

3. 49 U.S.C. § 40101(a)(6) and (12), respectively, state in relevant part:

In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

* * *

(6) placing maximum reliance on competitive market forces and on actual and potential competition

* * *

(12) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition—

(A) to provide efficiency, innovation, and low prices; and

(B) to decide on the variety and quality of, and determine prices for, air transportation services.

(Formerly codified at 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9).)

STATEMENT OF THE CASE

This case arises out of business relations, and business disputes, between airlines. Mesa and WestAir are regional airlines that entered into certain "code-share arrangements," which included partnership agreements with United. These agreements dealt with the providing of regional air service by Mesa and WestAir to numerous small cities and towns, with subsequent connections to United flights at certain "hub" airports.[1]

When the parties to those agreements experienced disagreements and difficulties in their business dealings with one another, this litigation ensued, and was initiated by United's request (filed in the United States District Court, N.D. Illinois, Eastern Division) for a declaratory judgment respecting an interpretation of one of the contracts. Petitioners counterclaimed, seeking damages against United for breach of contract, fraudulent inducement with respect to

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[1] The Seventh Circuit's decision contains (at App. 2a-6a, 219 F.3d at 606-07) a fairly detailed recitation of the substantive facts which chronicle the history of the business dealings and disputes between the parties. For purposes of this writ, Petitioners do not take issue with that recitation, other than to disagree with the Court's comments, in *dicta*, respecting the substantive validity of Petitioners' partnership allegations (App. 12a-13a, 219 F.3d at 610). Those allegations must, at any rate, be taken as true, given that the District Court's decision was made in the context of deciding Respondents' motion for judgment on the pleadings. *See Miree v. DeKalb County, Ga.*, 433 U.S. 25 (1977).

one of those contracts, and breach of the fiduciary duties inherent in the partnership relationship created by those contracts. Petitioners also sued a third party airline, Respondent SkyWest Airlines, Inc. ("SkyWest"), for tortious interference with those contracts.[2]

On August 6, 1999, the District Court granted the motion for judgment on the pleadings filed by Respondents United and SkyWest, and dismissed Petitioners' tort claims, finding that they all related to "routes of a carrier" and thus were "preempted by the ADA." App. 16a, 1999 WL 1144962, at *1. On October 4, 1999, pursuant to Petitioners' motion, the District Court certified its rulings for interlocutory appellate review, stating that the "preemption question is a pure question of law" (*Id.*) and citing as reasons, among other things, that the decision of the Third Circuit in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998) had "recently raised doubts about the Seventh Circuit's conclusion" in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), with respect to the preemption issue. App. 18a, 1999 WL 1144962, at *1.

Petitioners invoked the jurisdiction of the Seventh Circuit pursuant to 28 U.S.C. § 1292(b),

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[2] The District Court exercised jurisdiction over this action pursuant to 28 U.S.C. § 1332, as there was complete diversity of citizenship between the parties, and the amount in controversy exceeded $75,000, exclusive of interest and costs. The District Court possessed jurisdiction over Petitioners' counterclaims under 28 U.S.C. § 1332 and 28 U.S.C. § 1367(a).

in seeking its review of the District Court's August 6, 1999 Order. On December 16, 1999, the Seventh Circuit granted Petitioners' Petition for Leave to Appeal. In a July 5, 2000 decision authored by Judge Easterbrook, the Seventh Circuit subsequently affirmed the District Court's conclusion that the ADA preempted all of Petitioners' tort claims.

REASONS FOR GRANTING THE WRIT

The Airline Deregulation Act of 1978 represents a landmark piece of legislation that has had profound and far-reaching impact both on the airline industry and the public which it serves. However, the scope and parameters of the ADA, especially with respect to its preemption provision, have remained uncertain and confused, despite an enormous amount of litigation on this issue in the federal courts.[3]

This case concerns that uncertain scope of ADA preemption; the context being a business dispute between partners: namely, a major airline (United), and two regional air carriers (Mesa and WestAir). The providing of regional airline service is a critical component of the commercial air system—extending the cross-country network of interconnecting flights to

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[3] *See* Ann K. Wooster, *Annotation, Construction and Application of § 105 Airline Deregulation Act (49 U.S.C.A. § 41713), Pertaining to Preemption of Authority Over Prices, Routes, and Services*, 149 A.L.R. Fed. 299 (1998), for a compilation of such cases.

smaller cities which the major airlines (with their large jets) are often unable or unwilling to serve.

However, the Seventh Circuit's strict adherence to a "linguistic" analysis of the ADA's preemption provision—in a sharp split from the broader and more soundly-based "purpose and scope" analysis adopted by several other circuits—has resulted in a decision which is directly contrary to the "pro-competition" policies underlying the ADA, as well as the attendant "pro-contract" policies which have been emphasized by this Court. By refusing to allow Petitioners' breach of fiduciary duty claim, the Seventh Circuit has now effectively ruled that airlines, although they may be free to otherwise come to private agreements with each other, may not agree to be *partners* with one another, insofar as the *sine qua non* of such a relationship—the reciprocal fiduciary duties of the partners—will not be enforced in a court of law, because such duties allegedly implicate "rules external to the parties' bargain . . . ." App. 12a, 219 F.3d at 610.

In this era of mergers, code-share agreements and other alliances between and among air carriers, such a ruling will have a profound effect, not only on regional carriers and the essential services which they provide, but on the entire industry. Moreover, the marketplace has never operated in an environment devoid of common law constraints. Yet, by refusing to allow Petitioners' fraudulent inducement and tortious interference with contract claims, the Seventh Circuit has endorsed a manner of

unfettered and ungoverned competition which is as unprecedented as it is inappropriate.

I. The Absence Of Any Supreme Court ADA Jurisprudence Since *Wolens* Has Lead To The Outright Split Among The Circuit Courts Explicitly Recognized In The Seventh Circuit's Decision

A. Introduction

This Court has had only two occasions—its 1992 decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and its 1995 decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995)—to construe the extent and dimension of ADA preemption. In both of those decisions, the Court looked to its then-existing ERISA jurisprudence for guidance. However, that jurisprudence has since undergone substantial re-thinking and modification.

The question then becomes whether the corresponding ADA preemption analysis should now similarly reflect this new approach. Several circuits, including the Second[4], the Third[5], and the Ninth[6], have all held that the preemption provision should indeed be construed in light of

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[4] *See Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77 (2nd Cir. 1997).

[5] *See Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998).

[6] *See Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc), *reh'g denied*, 169 F.3d 594, 595 (9th Cir. 1999) (en banc).

the ADA's overall "structure and purpose" (in accordance with this Court's recent ERISA preemption analysis), as opposed to the more rigid "linguistic analysis" employed in *Morales*, *Wolens*, and the Court's then-existing ERISA jurisprudence.

The Seventh Circuit, in the case at bar, has now explicitly split from the Second, Third and Ninth Circuits on this issue, stating that:

> Opinions such as [the Third Circuit Decision in] *Taj Mahal* [cite omitted] . . . cannot be reconciled with *Wolens* . . . and we doubt that this position can be justified by the latest ERISA cases, even if we were free (which we are not) to prefer [such] decisions . . . over *Wolens* and *Morales*.

App. 8a, 219 F.3d at 608-09.

Finding that its "marching orders are clear," the Seventh Circuit accordingly stated that "if developments in pension law have undercut holdings in air-transportation law, *it is for the Supreme Court itself to make the adjustment,*" *(Id.*, App. 7a, 219 F.3d at 608*)* adding: "[N]*othing any other circuit has said about the subject persuades us to alter course.*" App. 9a, 219 F.3d at 609 (emphasis added).

The split among the circuits on this vitally important issue of ADA preemption is fundamental in scope, and not merely cosmetic in nature. The Seventh Circuit's decision makes

scarcely little attempt to reconcile the dismissal of Petitioners' tort claims with an analysis demonstrating that the prosecution of those claims would defeat or frustrate the overall purposes of the ADA. Clearly, had Petitioners litigated these same issues in the Second, Third or Ninth Circuits, their tort claims would have indeed survived preemption. Thus, the existing split in the circuits respecting which fundamental line of ADA preemption analysis to follow has now ironically created the very manner of uncertainty and disparate results that the ADA was designed, in part, to eliminate.[7]

The Second Circuit has described the problem as follows:

> The "related to" language of the ADA provides neither a predictable nor practical formula for distinguishing preempted from non-preempted state and local laws, and the Supreme Court has provided little guidance as to the meaning of "related to" after *Morales* and *Wolens*.

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[7] Another illustration of this confusion and uncertainty—made pertinent in light of Petitioners' claims for punitive damages in these proceedings—is the Third Circuit's split with the Seventh on the issue of whether the ADA preempts such claims. *See Taj Majal*, 164 F.3d at 195, in which the Third Circuit, in allowing the plaintiff to pursue a claim for punitive damages, stated that it was "not persuaded by [the] reasoning" of the Seventh Circuit in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia* on this issue.

Abdu-Brisson v. Delta Air Lines, Inc., 128 F.3d 77, 82 (1997). The Second Circuit concluded, in a somewhat apologetic tone, as follows:

> In his concurring opinion in *Dillingham Construction*, Justice Scalia labeled the ERISA preemption clause an "illusory test," a description which also fits the similar ADA preemption clause. [cite omitted] We appreciate the difficulties for all parties, including the district court, but we can offer no bright line relief.

Id. at 85. Similar sentiment has been expressed in the Third Circuit in *Taj Mahal*, 164 F.3d at 192-94.[8]

> In the absence of definitive guidance from the Supreme Court, the Courts of Appeals have struggled with the relationship between the [ADA's] preemption clause and state tort claims. The rulings have not been consistent, as a review of post-*Morales* appellate case law reveals.
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[8] *See also, Charas*, 160 F.3d at 1263 ("[T]he scope of this [ADA] preemption has been a source of considerable dispute since its enactment."), and *In re Air Transp. Excise Tax Litigation*, 37 F. Supp. 2d 1133, 1139 (D. Minn. 1999) ("[T]he Eighth Circuit has not yet had occasion to apply or expound on the Supreme Court's holding in *Wolens*, but other circuits have since struggled to draw the line that separates allowable state law claims from ADA-preempted ones.").

> As is apparent from these cases, attempts to resolve the issue of preemption in tort causes of action have been hampered by the ambiguous preemption terminology. The Supreme Court's efforts to arrive at a practical interpretation in *Morales* and *Wolens* have not resolved questions arising in the tort field.

In light of the foregoing, Petitioners respectfully submit that this Court should accept the Seventh Circuit's implicit invitation in the case at bar, and grant Petitioners' writ, so as to provide the much-needed guidance respecting the proper analysis and scope of the ADA's preemption provision. This issue has, since *Wolens*, well percolated throughout the federal courts, and the circuits are now indeed at a loggerhead[9], with the only consensus seemingly being that further guidance and direction from this Court would be salutary.

B. The Genesis of the Split: The Post-*Wolens* Changes in This Court's ERISA Jurisprudence

The split between the circuits as to which line of ERISA analysis should be applied to the

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[9] Indeed, in addition to the split created by the Seventh Circuit in the case at bar, the Ninth Circuit has also expressly rejected the ADA preemption analysis and approach of the Fifth Circuit—which has adopted an "operations-versus-service dichotomy"—calling such an approach "folly," and stating that it "invites nonsensical, inequitable, and inconsistent results . . . ." *Charas*, 160 F.3d at 1263.

ADA had its beginnings in the *Morales* decision, in which this Court, in attempting to analyze what Congress meant when it forbade states from enacting or enforcing laws, regulations or provisions "related to" a price, route, or service of an air carrier (*see* 49 U.S.C. § 41713(b)(1)), looked to similar "related to" language in ERISA's preemption clause, and adopted the same standard. At the time of *Morales*, the Court had been giving ERISA preemption an exceedingly broad scope, holding that the "breadth of [that provision's] preemptive reach is apparent from [its] language; that it has a broad scope, and an expansive sweep, and that it is broadly worded, deliberately expansive, and conspicuous for its breadth." *Morales*, 504 U.S. at 384 (internal cites and quotes omitted). Justice Scalia concluded, "[s]ince the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here . . . ." *Id.* In *Wolens*, decided on January 18, 1995, this Court cited to and relied upon that same ERISA jurisprudence. 513 U.S. at 223.

However, as the fates would have it, on the very same day that *Wolens* was decided, this Court heard argument on an ERISA preemption issue in the case of *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). In *Travelers*, a unanimous Court retreated from its strictly textual analysis of ERISA's preemption provision (i.e., the "related to" language), stating that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course,

for '[r]eally, universally, relations stop nowhere.'" 514 U.S. at 655 (citations omitted). Justice Souter concluded, "[W]e have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help in drawing the line here," adding that the analysis "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.*[10]

The analytical trend by this Court away from attempting to parse the literal words of the ERISA preemption clause has continued with such cases as *California Div. Of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997), in which Justice Scalia, in his concurring opinion, admonished the Court for not acknowledging that the earlier ERISA cases attempting to interpret and give effect to the plain language of the ERISA preemption provision "have in effect been abandoned." Similarly, in *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 815 (1997), Justice Stevens, for the majority, again focused on the intent of the law, rather than its literal language, and

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[10] In so concluding, *Travelers* found that the "related to" language of ERISA did not modify the "starting presumption" that Congress did not intend to supplant state law. 514 U.S. at 654. The Court therefore predicated its analysis on the assumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

found that the state law at issue was not preempted because it was only "one of 'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute."

The clear direction of this Court has thus been to limit the reach of ERISA's preemption clause to those state laws that actually interfere with the purpose of the federal statute. *See also Boggs v. Boggs*, 520 U.S. 833, 841 (1997), in which Justice Kennedy held: "We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects."

Predicated in large part upon their acknowledgement of the severe practical limitations inherent in any attempt to give meaning to the literal language of the "related to" provision in the ADA preemption clause, and coupled with the recognition of this Court's virtual abandonment of that effort in its recent ERISA jurisprudence, the Second Circuit (in *Abdu-Brisson, supra*), the Third Circuit (in *Taj Mahal, supra*), and the Ninth Circuit (in *Charas, supra*) have all similarly moved to an "ADA preemption test" which focuses on the purposes and policies of the ADA, rather than on the literal language of its preemption clause.

In *Abdu-Brisson*, the Second Circuit, relying upon this Court's post-*Shaw* ERISA jurisprudence, and citing to this Court's opinion in *Gade v. National Solid Wastes Management*

Ass'n, 505 U.S. 88, 98 (1992), found that the proper analysis respecting ADA preemption (indeed, any preemption case) was "to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." 128 F.3d at 83. Citing *Morales*, the Second Circuit accordingly found that the "structure and purpose" of the ADA "was based on a Congressional assumption that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services' . . . ." *Id.* at 84 (citing *Morales*, 504 U.S. at 378).

In *Charas*, the Ninth Circuit, *sua sponte*, sat *en banc* "to rethink [its] previous decisions" regarding "the circumstances under which the . . . [ADA] preempts certain state law claims." 160 F.3d at 1261. In holding that "in enacting the ADA, Congress intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry," the Ninth Circuit expressly overruled its earlier decisions in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995) and *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997). *Id.* at 1261. Notably, the court found that the ADA's "savings clause," read together with the preemption clause, operates to "evidence congressional intent to prohibit states from regulating the airlines *while preserving state tort remedies that already existed at common law, provided that such remedies do not significantly*

impact federal deregulation." *Id.* at 1265. (Emphasis added.)

The Third Circuit, citing *Charas*, has similarly held that the test of ADA preemption is *"whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation."* *Taj Mahal*, 164 F.3d at 194 (emphasis added). In so concluding, the court reasoned that "[w]hen state law does not have *a regulatory effect*, it is 'too tenuous, remote, or peripheral' to be preempted." *Id.* (emphasis added) (citing *Morales*, 504 U.S. at 390). The court further noted that just as the Department of Transportation "has neither the authority nor the apparatus required to superintend contract disputes" (quoting *Wolens*, 513 U.S. at 232), "[t]hat observation applies equally to tort disputes." *Id.*

It is these decisions of the Second, Third and Ninth Circuits, relying as they do upon the line of ERISA cases decided subsequent to *Wolens*, at which the Seventh Circuit and Judge Easterbrook have now taken square aim, in holding that such a change in analytical framework would necessitate an implicit overruling of *Morales* and *Wolens*. The Second, Third and Ninth Circuits apparently feel otherwise; nevertheless, one thing is clear: there is a split, as well as much confusion in the circuits, and the issue of ADA preemption is, by any measure, ripe and ready for further Supreme Court guidance and direction.

II. The Decision Of The Seventh Circuit Is In Conflict With This Court's Decision In *Wolens*, And Places Airline Contracts, As Well As Airline Competition, In Peril

In finding that the ADA's preemption clause did not reach "self-imposed undertakings," *Wolens* recognized the fundamental importance of private agreements as a means of achieving the ADA's pro-competitive goals:

> The ADA . . . was designed to promote 'maximum reliance on competitive market forces.' [cite omitted] *Market efficiency requires effective means to enforce private agreements.*

513 U.S. at 230 (emphasis added). The Court went on to emphasize the "fundamental" importance that such agreements, "freely made," be enforced. *Id.* (citing *Brief for United States as Amicus Curiae*, at 23, wherein it was stated that "[T]he stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time."). In bringing their tort claims, Petitioners here simply seek such an enforcement and protection of their agreements with United.

Far from interfering with or frustrating any ADA policies and purposes, allowing Petitioners to bring their tort claims against Respondents, under the circumstances presented here, would undeniably *promote* competition, by enforcing and

protecting the private contracts which are so "fundamental" to the "market efficiency" which the ADA was designed to promote. [11]

Notably, the common law torts which Petitioners have brought do not represent an effort by the State to "impos[e its] own substantive standards with respect to rates, routes, or services . . . . " *Wolens*, 513 U.S. at 232. Rather, this dispute simply involves private parties using the judicial process to: (1) enforce and protect the mutual rights and obligations which the contracting parties voluntarily chose to assume; and (2) protect the integrity of those agreements by allowing remedies to be brought against a third party for its intentional efforts to tortiously undermine them. The fact that, by their nature, the *subject matter* of those private agreements happens to concern "routes", is wholly irrelevant to the state and federal deregulation aims of the ADA.

What is at issue here is the manner in which the Respondents conduct their business relations; not the manner in which they conduct their business of transporting passengers. United's liability for breach of its fiduciary duties and its fraudulent inducement is purely a product of its own decision to induce Petitioners to enter into agreements through fraudulent misrepre-

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[11] Indeed, insofar as the traditional common law torts brought by Petitioners certainly did not impair federal regulation *before* the ADA, it is difficult to imagine how those traditional torts could impair deregulation *after* the ADA.

sentations, and then breach the fiduciary duties necessarily created by those agreements. A verdict in favor of Petitioners on these claims will merely admonish United that in the event it chooses to enter into and consummate business agreements, that it must do so without misrepresentations, and in fulfillment of the obligations thus created, in the same manner as is required of any other private or commercial entity.

The same is true for the intentional interference with contract claims brought against SkyWest, which merely represent a traditional common law remedy necessary to preserve the sanctity of Petitioners' pre-existing contractual relationship with United.

In many respects then, this dispute goes to the very heart of the ADA's enactment. That is, in a marketplace freed from excessive governmental regulation, it is essential, in order to avoid both injustice and anarchy, that the "rules of the game," as created by the airlines themselves in their agreements with one another, be enforced and protected. However, the ADA itself has no mechanism for doing so; nor is there any indication that Congress intended these issues to be governed by some manner of federal common law.[12] Rather, as is traditionally the case

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[12] Nor, contrary to Judge Easterbrook's implications, is the Department of Transportation a substitute for the private causes of action which Petitioners have now been denied. There is no private right of action under the FAA (*Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)) and the DOT may not therefore act to vindicate private rights. *Id.* at 301.

respecting private disagreements, Congress clearly intended that such disputes be resolved, and that such privately-created "rules" be enforced and protected, pursuant to traditional common law remedies.

Moreover, under no circumstances could one imagine that Congress intended to promote "competitive conduct" which has traditionally and universally been considered to be wrongful and tortious, such as intentionally interfering with a valid contractual relationship between two other parties.[13] Indeed, insofar as government regulation of conduct is to be replaced under the ADA with "private regulation" through private contracts and agreements, it is all the more important that the private business dealings between airlines be subject to traditional and enforceable remedies for wrongful and tortious conduct.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their writ of certiorari be granted.

Moreover, the civil penalty of not more than $10,000 to which the Respondent airlines may be liable under the ADA (49 U.S.C. § 46301(c)), will hardly be a deterrent, considering the literally hundreds of millions of dollars by which Respondents may be unjustly enriched as a result of their tortious conduct as here alleged.

[13] The *Restatement (Second) of Torts* § 768(2) (1977) in fact denies a competitive privilege for inducing breach of an existing contract.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Argued: May 10, 2000
Decided: July 5, 2000
Docket No. 00-1110

UNITED AIRLINES, INC.,
Plaintiff, Counterdefendant-Appellee,

v.

MESA AIRLINES, INC. and WESTAIR COMMUTER AIRLINES, INC.,
Defendants, Counterplaintiffs-Appellants,

v.

SKYWEST AIRLINES, INC.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 97 C 4455—Elaine E. Bucklo, Judge.

Before EASTERBROOK, RIPPLE, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.*

Like other major air carriers, United has entered into code-sharing agreements with regional airlines, which fly smaller planes for shorter distances to less populated destinations. The major carrier permits the commuter carrier to use its service marks and logos for flights to and from its hub airports, and it lists the connecting flights in its computer reservation system under its name, carrier code, and flight numbers, such as "UA 2345" (hence the term "code-share," see 14 C.F.R. § 257(c)). The commuter carrier also receives part of the revenue from through traffic that uses both carriers' facilities. In exchange, the commuter carrier is subject to substantial direction: it tailors its schedules so that they mesh with the major carrier's arrivals and departures at the hub, provides planes appropriate to the traffic generated by the major carrier, and agrees to accept revenue that the major carrier controls. (Contracts set the percentage of through rates that the commuter carrier receives, but the major carrier sets the total fares, and thus determines the commuter carriers' revenues.) Major carriers could use their discretion to make commuter carriers' operations unprofitable, but that would hurt the majors' business by drying up local service and driving passengers to other carriers that provide better connecting flights. Market forces thus constrain the exercise of contractual powers.

Mesa Airlines and WestAir Commuter Airlines, two regional airlines that had code-share arrangements with United, believe that courts as well as markets should constrain the major carriers' conduct. Mesa conducted regional

operations to and from Denver, and WestAir to and from Los Angeles, San Francisco, Portland, and Seattle. Mesa acquired WestAir as a subsidiary in 1992. In 1995 United extended Mesa's contractual term for ten years and to additional cities; at the same time, Mesa purchased a number of planes from United. Mesa believes that by paying (in its view, overpaying) for these aircraft it acquired rights beyond those of other commuter carriers; it contends that United became its "partner" rather than simply the opposite party to an arms'-length contract. Relations soured in June 1997 when United replaced WestAir with SkyWest Airlines on eight routes out of Los Angeles. After WestAir protested, United filed this suit under the diversity jurisdiction seeking a declaratory judgment that the WestAir-United contract permitted United to make these changes. WestAir abandoned its remaining commuter routes in May 1998. Meanwhile Mesa and United reached impasse on financial arrangements at Denver. Mesa contended that United was keeping for itself too much of the revenues on through routes and charging excessively for space and baggage handling services at Denver International Airport, which opened early in 1995. Mesa contends that it began to incur losses of $1 million per month, to which it responded by eliminating service to some local markets. United insisted that Mesa serve all regional markets to which it had exclusive rights under the extended agreement; after Mesa refused, United terminated the agreement in January 1998 and amended its suit by seeking a declaratory judgment that this step, too, was proper, and damages for Mesa's breach.

Mesa and WestAir filed counterclaims against United and added SkyWest as a third-party defendant. They seek damages on four theories. First, Mesa and WestAir contend that United broke its contracts; these claims are mirror images of United's. Second, Mesa and WestAir contend that SkyWest is liable for tortiously interfering with the contract between United and WestAir at Los Angeles. They contend that SkyWest inveigled United to switch regional carriers by offering two gates at Los Angeles International Airport—gates that United coveted, an offer that WestAir could not match. Third, Mesa and WestAir allege that United violated the fiduciary duties that it owed them as their partner. Fourth, Mesa contends that United fraudulently induced it to purchase the airplanes and enter into the extension. Claims 2, 3, and 4 seek punitive as well as compensatory damages. United and SkyWest prevailed on the pleadings after the district court concluded that these three claims are preempted by § 105(a)(1) of the Airline Deregulation Act of 1978. As recodified in 1994, this statute reads:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1). State common law counts as an "other provision having the force and effect of law" for purposes of this statute. See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n. 8, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). See also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 502-03, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (plurality opinion), *id.* at 503-05, 116 S.Ct. 2240 (Breyer, J., concurring), *id.*, at 509-12, 116 S.Ct. 2240 (O'Connor, J., concurring in part and dissenting in part) (characterizing tort remedies as regulatory provisions for purposes of preemption clauses in another statute). A broad clause saving common-law remedies might overcome the understanding that judgments in tort suits should be treated like state laws and regulations to the extent they have the same practical effect as laws and regulations, see *Geier v. American Honda Motor Co.*, ____ U.S. ____, ____, 120 S.Ct. 1913, 1918, 146 L.Ed.2d 914 (2000); *cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-56, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); but the savings clause in the Airline Deregulation Act says only that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c). This does not carve any domain from the scope of § 105(a)(1). The district court concluded that all three tort claims relate to an air carrier's routes—they concern which carriers fly to which destinations from which airports, and which carriers provide service (and at what rates) on through or joint routes—and therefore are preempted. See *Travel All Over the World, Inc. v. Saudi Arabia*, 73 F.3d 1423, 1430-

35 (7th Cir. 1996). The district judge certified the order for interlocutory appeal under 28 U.S.C. § 1292(b). We agreed to hear the appeal; proceedings on both sides' contract claims (which under *Wolens* are not preempted) have stalled pending its resolution.

One line of argument might have been that although the *claims* at issue may be "related to a . . . route . . . of an air carrier" in interstate commerce, Mesa and WestAir do not rely on any "*law, regulation, or other provision having the force and effect of law* related to a . . . route . . . of an air carrier" (emphasis added). Section 105(a)(1) might have been read to limit preemption to a law, regulation, or common law doctrine directed to the air transportation industry, as in *Morales*, which held that § 105(a)(1) precludes efforts by state attorneys general to promulgate a special code of conduct for advertisements by air carriers. On this understanding, laws of general applicability would not be preempted just because the subject of a particular case was air transportation. Tort law is not industry-specific; Mesa and WestAir want to use the same principles that apply to disputes about computer software, see *J.D. Edwards & Co. v. Podany*, 168 F.3d 1020 (7th Cir. 1999) (Illinois law), and employment, see *Farr v. Gruber*, 950 F.2d 399 (7th Cir. 1991) (Wisconsin law). *Wolens* read § 105(a)(1) more broadly, however. Participants in a carrier's frequent flyer program filed suit when the carrier changed the program's rules. One claim arose under a state's consumer fraud act, a statute of general applicability. Nonetheless, the Court held, § 105(a)(1) preempts application of

that law to frequent flyer programs, which affect rates because they are discounts. 513 U.S. at 226-28, 115 S.Ct. 817.

Because *Wolens* held general consumer-fraud law preempted, Mesa and WestAir have a big problem. One solution, as they see it, lies in recent decisions under ERISA, which preempts state laws that "relate to" its subject. Both *Morales* and *Wolens* relied on doctrine developed under ERISA, and at the time the Court's opinions tended to read the ERISA language broadly. E.g., *Morales*, 504 U.S. at 383-84, 112 S.Ct. 2031, relying on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Times have changed for pension and welfare plans. More recent decisions hold that state laws of general applicability are not preempted just because they have economic effects on pension or welfare plans. See, e.g., *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995); *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997); *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997). Mesa and WestAir ask us to follow this approach and curtail the preemptive effect of § 105(a)(1) accordingly. But if developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. Our marching orders are clear: follow decisions until the Supreme Court overrules them. *State*

Oil Co. v. Khan, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Opinions such as *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 195 (3d Cir. 1998), which say that state law is preempted by § 105(a)(1) only if it "frustrate[s] Congressional intent [or] impose[s] a state utility-like regulation on the airlines", cannot be reconciled with *Wolens* (the general anti-fraud statute held preempted there was a long distance from "utility-like regulation"), and we doubt that this position could be justified by the latest ERISA cases, even if we were free (which we are not) to prefer decisions such as *De Buono* and *Dillingham* over *Wolens* and *Morales*. One subject of *UNUM Life Insurance Co. v. Ward*, 526 U.S. 358, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999), the Court's most recent encounter with preemption under ERISA, was whether a general doctrine of state agency law could be used to override the express terms of a welfare-benefit plan. The Court answered "no," see 526 U.S. at 377-79, 119 S.Ct. 1380, and this conclusion, like *Wolens*, necessarily means that a claim under, or application of, state law may be preempted as related to the federal topic, even though the rule in question does not single out pension or welfare plans – or air carriers' rates, routes, or services. Our opinion in *Travel All Over the World* used the approach established by *Wolens* and *Morales*, concluding that a claim is preempted if *either* the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have "a

significant economic effect upon them" (73 F.3d at 1432); nothing any other circuit has said about the subject persuades us to alter course.

The possibility that recent ERISA decisions would lead us to abandon *Travel All Over the World* and follow *Taj Mahal Travel* (which declined to follow this circuit's position, see 164 F.3d at 193-95) is what induced the district court to certify its order for interlocutory appeal. But an appeal under § 1292(b) brings up the whole certified order, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-05, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996); *Edwardsville National Bank & Trust Co. v. Marion Laboratories, Inc.*, 808 F.2d 648, 650-51 (7th Cir. 1987), rather than just the legal issue that led to certification. Thus we must tackle the regional carriers' contention that their claims are sound, despite *Travel All Over the World*, for the same reason the Supreme Court held in *Wolens* that contract claims are not preempted: § 105(a)(1) is designed to replace regulation with voluntary agreements, see 513 U.S. at 228-35, 115 S.Ct. 817, and the fact that states sometimes apply the label "tort" to common-law doctrines that implement private agreements cannot doom their claims, the carriers insist. This is unimpeachable as a principle, but does it save these carriers' claims? *Wolens* tells us to distinguish

> between what the State dictates and what the airline itself undertakes [, which] confines courts . . . to the parties' bargain, with no enlargement

> or enhancement based on state laws or policies external to the agreement.

513 U.S. at 233 (footnote omitted). It is awfully hard to understand the regional carriers' claims as efforts to enforce "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement."

Let us start with Mesa's contention that its purchase of aircraft, and the extension of its code-sharing agreement with United at Denver, are the result of fraudulent inducement. This is not by any stretch of the imagination a request to enforce the parties' bargains; it is a plea for the court to replace those bargains with something else. Doubtless the institution of contract depends on truthfulness; the staunchest defenders of private institutions and limited government believe that public bodies must enforce rules against force and fraud. E.g., Richard A. Epstein, *Principles for a Free Society* 82-85 (1998). When all a state does is use these rules to determine whether agreement was reached, or whether instead one party acted under duress, it transgresses no federal rule. But when the state begins to change the parties' financial arrangements, as Mesa demands, it is supplying external norms, a process that the national government has reserved to itself in the air transportation business. Mesa does not want to cancel the agreement and restore the *status quo* as of 1994. It wants damages. *Wolens* held that § 105(a)(1) preempts state anti-fraud statutes as applied to air carriers' rates, routes, and services, 513 U.S. at 227-28, 115 S.Ct. 817; just

so with common-law rules against fraudulent inducement, which differs from a contention that one party knuckled under to a show of force by the other. And as in *Wolens* this conclusion does not leave regional air carriers at the mercy of unscrupulous major carriers (or the reverse); the Secretary of Transportation has been charged with investigating claims of deceit in the air transportation business and has the power to issue remedial orders (including monetary penalties) against air carriers that resort to fraudulent practices. 49 U.S.C. §§ 41712, 46301; *Wolens*, 513 U.S. at 228 n. 4, 115 S.Ct. 817; Morales, 504 U.S. at 379, 390-91, 112 S.Ct. 2031.

Next consider the contention of both Mesa and WestAir that fiduciary principles drawn from partnership law should be applied. Partnership is contractual; partners can and do specify their relations in detail, and the norms of partnership law are just background rules that cover a subject when contracts do not. In this sense partnership and fiduciary rules are a part of contract law, cf. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995). But Mesa and WestAir assert that the law of partnerships imposes on United duties that *override* the contract. For example, United contends that its contracts permit it to regulate the destinations and flight frequency of the code-share regional carriers; Mesa and WestAir deny this, and if they are right then they will prevail under their contracts. But they contend (under their partnership theory) that they prevail *even if* United had the contractual power

to do what it did. According to Mesa and WestAir, United had a fiduciary obligation to use its contractual powers for *their* economic benefit, rather than for its own, and that they are entitled to punitive damages because (in the language of their brief) United attempted "to terminate Mesa's rights and interests in the Partner Agreement for its own benefit and to Mesa's detriment". Illinois permits one party to a contract to use for its own benefit the rights and powers it has negotiated. See *L.A.P.D., Inc. v. General Electric Corp.*, 132 F.3d 402 (7th Cir. 1997); *Echo, Inc. v. Whitson Co.*, 121 F.3d 1099 (7th Cir. 1997); *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir. 1996); *Industrial Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128 (7th Cir. 1996); *Continental Bank, N.A. v. Everett*, 964 F.2d 701 (7th Cir. 1992); *Jespersen v. Minnesota Mining & Mfg. Co.*, 183 Ill.2d 290, 233 Ill.Dec. 306, 700 N.E.2d 1014 (1998); *Hentze v. Unverfehrt*, 237 Ill.App.3d 606, 610-11, 178 Ill.Dec. 280, 604 N.E.2d 536, 539 (1992). Only rules external to the parties' bargain could defeat this, but § 105(a)(1) in turn defeats external rules. (We are skeptical that the word "partner" on the cover sheet of a complex contract that characterizes the regional carriers as "independent contractors" would bring the law of partnership into play in the first place. Businesses often refer to suppliers, customers, and producers of complementary products colloquially as "our partners" without summoning up fiduciary duties. See *Vaughn v. General Foods Corp.*, 797 F.2d 1403 (7th Cir. 1986). A consumer who sees the advertising slogan "Partners in Progress" would not assume that he

had become a "partner" of the producer, which then must set prices for the consumer's benefit. But we need not pursue this point, given § 105(a)(1).)

Finally, consider the claim that SkyWest tortiously interfered with the contract WestAir had with United. Here, too, Mesa and WestAir rely on principles outside the parties' agreements – for they have reached no agreement at all with SkyWest. Why can't SkyWest offer United gates at Los Angeles International Airport in exchange for some code-share business at LAX? That question can't be answered by reference to a contract between SkyWest and any other party to the case. Even the appearance of a link between the claim against SkyWest and the contract claim against United may be illusory, because most states (including Illinois) treat as tortious some interferences with prospective economic advantage, even if the interference does not cause anyone to break a promise. Suppose, for example, that United's contract with WestAir contained a clause entitling United to end the business relation for any or no reason. Then WestAir could not sue United—but it still could prevail in tort against SkyWest, if the sort of inducement SkyWest offered, or the motive for SkyWest's action, ran afoul of a state's public policy. See, e.g., *J.D. Edwards*, *supra*; *Jeppesen v. Rust*, 8 F.3d 1235 (7th Cir. 1993); *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill.App.3d 731, 245 Ill.Dec. 465, 728 N.E.2d 547 (2000); *Strosberg v. Brauvin Realty Services, Inc.*, 295 Ill.App.3d 17, 33, 229 Ill.Dec. 361, 691 N.E.2d 834, 845 (1998); *Reuben H. Donnelley*

Corp. v. Brauer, 275 Ill.App.3d 300, 312-13, 211 Ill.Dec. 779, 655 N.E.2d 1162, 1172 (1995). No surprise, then, that courts regularly treat claims of tortious interference with contract (or interference with economic advantage) as preempted in labor law, given how readily these claims may be used to get around contracts (or limits on the means of enforcing contracts). See, e.g., *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1047, 1049 (7th Cir. 1987) (en banc), reversed on other grounds, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); *Kimbro v. Pepsico, Inc.*, 215 F.3d 723 (7th Cir. 2000). Likewise they are preempted when they would have a significant effect on air carriers' rates, routes, or services—as these claims, which are all about WestAir's (and SkyWest's) routes and divisions of revenues, assuredly do whether or not they would lead to punitive damages. Cf. *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862 (7th Cir. 1999) (illustrating how the tort of interference with economic advantage may be used to suppress competition, which would undercut the Airline Deregulation Act of 1978).

Mesa and WestAir protest that none of their claims offends the goals and policies that Congress likely aimed at in 1978. One could have said the same (indeed, Justice Stevens *did* say the same) about the regulations and statutes held preempted in *Morales* and *Wolens*. But Justice Stevens was in dissent; the majority concluded that the statute applies according to its text, rather than according to goals and motives imputed to legislators. For what it may be worth, however, we are inclined to think that allowing

these claims to proceed *could* gum up the works. Mesa offered service to multiple states from Denver, service United used to construct through rates and routes for travel across many jurisdictions. So too for regional service out of Los Angeles, which reached Oregon and Washington, and affected through travel to and from other states and nations. Yet Mesa and WestAir want us to hold that the tort law of Illinois determines (for example) what inducements SkyWest may offer United to reassign routes among regional carriers in the southwest, and how much Mesa should receive for its portion of through rates on service from Miami through Denver to Jackson, Wyoming. Illinois is United's headquarters, and the parties agreed that their contracts would be interpreted under Illinois law, but as a source of tort law Illinois has no plausible claim—and for that matter no other state has much of a claim either. Basic rules for inter-carrier transactions may come from voluntary agreements or from the Department of Transportation; applying the conflicting tort principles of 50 different states to these interstate and international transactions would make a mess of things. Preemption under § 105(a)(1) enables a system of private law, with nationally uniform overrides, to flourish.

AFFIRMED

APPENDIX B

United States District Court, N.D. Illinois, Eastern Division.

No. 97 C 4455.

Oct. 5, 1999.

BUCKLO, District J.

In my order of August 6, 1999, I granted judgment on the pleadings in favor of United on Mesa and Westair's claims for fraud and breach of fiduciary duty and in favor of Skywest on Mesa and Westair's claims for intentional interference with contractual relations. I reasoned that the Seventh Circuit has held that "tort claims that refer to or have a connection with rates, routes, or services [are] preempted by the [Airline Deregulation Act, 49 U.S.C. § 41713(b)(1)(ADA)]." *Travel All Over the World v. Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) ("*Travel All*"). Fraud, breach of fiduciary duty, and intentional interference with contractual relationships are all causes of action which sound in tort, and because the tort claims of these parties relate to routes of a carrier, I held them to be preempted by the ADA.

The claims of United and several counterclaims remain, so there is no final judgment entitling any party to appeal this ruling. Mesa and Westair move for certification under 28 U.S.C. § 1292(b) on the grounds that the ruling involves a controlling question of law as to which

there is substantial ground for difference of opinion and that immediate appeal will materially advance the ultimate termination of the litigation. Certification is an "exceptional" procedure, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). The parties seeking it bear a heavy burden. However, the Third and the Tenth Circuits have certified preemption rulings with regard to the provision in question. See *Abdullah v. American Airlines*, 181 F.3d 363 (3rd Cir. 1999); *Cleveland v. Piper Aircraft Co.*, 985 F.2d 1438 (10th Cir. 1993).

Although it is a close issue, I hold that the burden is satisfied here. The preemption question is a pure question of law and not an issue of fact. It is a "controlling" question of law, one the resolution of which "is quite likely to affect the further course of litigation, even if not certain to do so." *Sokaogon Gaming Enterp. v. Tushie-Montgomery Assoc.*, 86 F.3d 656, 659 (7th Cir. 1996). If the tort claims can be disposed by preemption the litigation will be considerably simplified and so quite likely affected; likewise if they cannot, they can be litigated now instead of relitigated on later appeal. In any case the course of further litigation would be substantially affected.

The close issue arises in considering whether there are substantial grounds for difference of opinion regarding the preemption question in this case. On the one hand, I think the statutory language mandates the disposition of the tort claims I have made. On the other hand, I acknowledge the force the arguments

that: (1) the Supreme Court and the Seventh Circuit have not ruled on that the particular torts in dispute in this case are preempted by the ADA; (2) the preemption of tort claims by statutes that clearly preempt some such claims (such as the NLRA) is a vexed question, see, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985) (NLRA context); (3) only a small handful of cases deal with the issue, perhaps insufficient to regard the matter as settled, and (4) the Third Circuit has recently raised doubts about the Seventh Circuit's conclusion, see *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 193 (3rd Cir. 1998). Since reasonable minds might differ with my view, although of course they would be wrong, I conclude that there are substantial grounds for a difference of opinion.

Finally, there is the issue of whether the appeal may materially advance the ultimate termination of the litigation. In this case, affirmance would mean that the tort claims, and one of the parties (Skywest) would be out of the case. Reversal and remand would restore the tort claims and enable their resolution in these proceedings.

I therefore grant the motion for certification, finding that the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal will materially advance the ultimate termination of the litigation.

ENTER ORDER:

/s/ Elaine E. Bucklo
U. S. District Judge

Dated: October 4, 1999

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:97-cv-04455
Title: United AL v. Mesa AL Inc
Assigned Judge: Honorable Elaine E. Bucklo

MINUTE ORDER of 8/6/99 by Hon. Elaine E. Bucklo: Plaintiff's motion for judgment on the pleadings for count VII and Count VIII of Mesa Airlines, Inc.'s counterclaims and count III of Westair Commuter Airlines, Inc.'s counterclaims [54-1] and Skywest Airlines' motion for judgment on Mesa Airlines' and West Air Commuter Airlines' third-party complaint against it are granted [51-1]. (See reverse of minute order.) Mailed notice.

This docket entry was made by the Clerk on August 10, 1999.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:97-cv-04455
Title: United AL v. Mesa AL Inc
Assigned Judge: Honorable Elaine E. Bucklo

MINUTE ORDER of 10/4/99 by Hon. Elaine E. Bucklo: The motion of Mesa Airlines and Westair Commuter Airlines for certification of court's order of 08/06/99 54(b); 28 U.S.C. [section 1292(b)] is granted [80-1] with respect to the claims against both Skywest Airlines and United Airlines. (See reverse of minute order.) Mailed notice.

This docket entry was made by the clerk on October 5, 1999.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 15, 1999

By the Court:

MESA AIRLINES, INCORPORATED and WESTAIR COMMUTER AIRLINES, INCORPORATED, Petitioners,	)	Petition for Permission to Appeal Pursuant to 28 U.S.C. 1292(b) Northern District of Illinois, Eastern Division. 97 C 4455 Elaine E. Bucklo, Judge.
v.	)	
No. 99-8038	)	
UNITED AIRLINES, INCORPORATED, Respondent.	)	

Upon consideration of the **PETITION FOR LEAVE TO APPEAL OF DEFENDANTS, COUNTER-PLAINTIFFS AND THIRD-PARTY PLAINTIFFS, MESA AIRLINES, INC. AND WESTAIR COMMUTER AIRLINES, INC.,** filed October 13, 1999, by counsel,

IT IS ORDERED that the respondent **RESPOND** to the petition by October 29, 1999.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 16, 1999

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

MESA AIRLINES, INCORPORATED and WESTAIR COMMUTER AIRLINES, INC., Petitioners,	)	Petition for Permission to Appeal Pursuant to 28 U.S.C. 1292(b) Northern District of Illinois, Eastern Division.
v.	)	
No. 99-8038	)	Elaine E. Bucklo, Judge.
UNITED AIRLINES, INCORPORATED, Respondent.	)	

The following is before the court:

1. **PETITION FOR LEAVE TO APPEAL OF DEFENDANTS, COUNTER PLAINTIFFS AND THIRD-PARTY PLAINTIFFS, MESA AIRLINES, INC. AND COMMUTER AIRLINES, INC. [28 U.S.C. § 1292(b)]**, filed

on October 13, 1999, by counsel for the petitioners.

2. **RESPONSE OF UNITED AIRLINES, INC. AND SKYWEST AIRLINES, INC. IN OPPOSITION TO DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**, filed on October 29, 1999, by counsel for respondent.

IT IS ORDERED that the Petition for Leave to Appeal is **GRANTED**. Petitioners shall pay the required appellate fees to the clerk of the district court within ten days from the entry of this order pursuant to Fed.R.App.P. 5(d)(1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

IT IS FURTHER ORDERED that briefing in the appeal from appeal no. 99-8038 will proceed as follows:

1. The brief and required short appendix of petitioners are due January 26, 2000.

2. The brief of the respondent is due February 25, 2000.

3. The reply brief of the petitioners, if any, is due March 10, 2000.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ORAL ARGUMENT

Date: March 27, 2000
By the court:
No. 00-1100
UNITED AIRLINES, INCORPORATED,
Plaintiff – Appellee

v.

MESA AIRLINES, INCORPORATED and WESTAIR COMMUTER AIRLINES, INCORPORATED,
Defendants – Appellants

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 97 C 4455, Elaine E. Bucklo, Judge

IT IS ORDERED that this case be set down for oral argument on Wednesday, May 10, 2000, in the Courtroom of the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn, Room 2721, Chicago, Illinois at 9:30 a.m.

Oral argument will be no more than 15 minutes for each side. Counsel are advised that the panel of judges assigned to oral argument may decide, after reading the briefs, that less time is required for oral argument.

Copies of this notice have been sent to counsel of record.

Supreme Court, U.S.
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No. 00-496

In The Supreme Court of the United States

MESA AIRLINES, INC. AND
WESTAIR COMMUTER AIRLINES, INC.,
Petitioners,

v.

UNITED AIRLINES, INC. AND SKYWEST AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

United Airlines entered into "code sharing" agreements with two regional air carriers to provide United Express service on particular routes. When a dispute arose as to the proper interpretation of those contracts, the regional carriers sought to invoke a series of state tort remedies to impose obligations on United above and beyond those to which it agreed in the parties' contracts. The Court of Appeals held that these tort claims were preempted by the Airline Deregulation Act of 1978 ("the ADA"). There are only two questions presented:

1. Whether the Court of Appeals properly applied this Court's opinion in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), in concluding that the regional carriers' tort claims — but not their contract claims — were preempted by the ADA; and

2. Whether this Court should grant certiorari in this case to reconsider the ADA preemption analysis adopted in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *Wolens* in light of its subsequent decisions interpreting the scope of preemption under ERISA and claimed conflicts in the Circuits concerning the outer limits of ADA preemption.

RULE 29.6 STATEMENT

Respondents are United Airlines, Inc. ("United") and SkyWest Airlines, Inc. ("SkyWest"). United is a wholly-owned subsidiary of UAL Corporation, which is publicly traded. SkyWest has no parent corporation; however, Delta Airlines, Inc., which is a publicly held corporation, owns 10% or more of SkyWest's stock.

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INTRODUCTION

Petitioners seek certiorari to overturn the Seventh Circuit's decision that the tort claims they asserted against United and SkyWest were barred by the preemption clause of the Airline Deregulation Act of 1978 (the "ADA"), which precludes states from enacting or enforcing any law "related to a price, route, or service of an air carrier." Section 105(a)(1) of the ADA, 49 U.S.C. § 41713(b).[1/] There are a number of reasons why the petition should be denied.

First, the Seventh Circuit's decision was based on a straightforward application of this Court's reasoning in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995). In *Wolens*, the Court held that the ADA does not preempt the application of state law to claims relating to airline rates, routes or services so long as the plaintiff is merely attempting to enforce a private agreement the airline voluntarily made, but that the ADA does preempt any attempt to enforce "state laws or policies external to the agreement" to enhance or enlarge the parties' bargain. In this case, the Seventh Circuit concluded that petitioners were seeking to use their state law tort claims to impermissibly enlarge or enhance the parties' bargain with respect to airline routes and services and, in so doing, to effectively use state laws to regulate airline decisions with respect to routes and services. Petitioners quarrel with the

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[1/] The original version of the preemption provision prohibited the enactment or enforcement of any state law "related to rates, routes, or services of any air carrier." 49 U.S.C. *App.* § 1305(a)(1). As part of a 1994 codification when Title 49 was reenacted, Congress altered this language slightly (changing "rate" to "price") but without making any substantive change. See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1(1995). Because this Court's cases and the Seventh Circuit's opinion below use the term "rates, routes or services," we have done so as well throughout this brief.

Seventh Circuit's conclusion that their tort claims are designed to alter, rather than enforce, the parties' agreements. But that is precisely the kind of fact-specific determination that does not warrant this Court's attention.

Second, this Court's recent ERISA preemption cases should not cause it to re-examine the scope of preemption under the very different provisions of the ADA. Nor is there a real conflict among the Circuits on the proper interpretation of the term "related to" in the ADA. It is true that there is a conflict between the Fifth and Ninth Circuits with respect to the scope of the term "services" as applied to personal injury claims. But this case does not turn on the meaning of "services": the tort claims at issue here would be preempted even under the Ninth Circuit's very narrow definition of that term.

Third, even if the Court concludes that there is a conflict among the Circuits, this case is not an appropriate vehicle to use to resolve it. This case is still in an interlocutory posture. Moreover, the issues it raises are unlike the issues raised in any of the other ADA preemption cases petitioners cite. Virtually all of the litigation under the ADA since *Wolens* has been over employee and personal injury claims or about claims that are not directly related to rates, routes or services, but that are claimed to have an *indirect* impact on those prohibited areas. In those cases, the courts have been called upon either to determine the proper scope of the term "services" or to make a judgment with respect to the outer limits of what types of claims should be deemed "related to" rates, routes or services. This case, by contrast, involves a dispute between airlines that deals directly with airline routes and services, no matter how narrowly the term "services" is defined. As a result, this case does not squarely raise the issues that have caused the Circuits to disagree.

Indeed, the tort claims at issue in this case would be preempted even if the Court were to adopt the test petitioners suggest, under which the court "focuses on the purpose and policies of the ADA, rather than on the literal language of its preemption clause." Pet'n at 15. As the Seventh Circuit concluded, in this particular case, the purpose and policies of the ADA require preemption in order to avoid the "mess" that would result from "applying the conflicting tort principles of 50 different states to these interstate and international transactions." App. 15a.

STATEMENT

In 1990 and 1992, United entered into "code-sharing" agreements with Mesa Airlines, Inc. and a Mesa subsidiary, WestAir Commuter Airlines, Inc., under which Mesa and WestAir agreed to provide scheduled airline service under the "United Express" service mark on specified routes in a number of western states. Exs. 1 and 2 to United's Complt., R.6 (filed under seal). These code-sharing agreements were beneficial to Mesa and WestAir because they were given the right to use United's logos and service marks, their flights were listed in United's computer as United flights, and they were given a share of certain revenues. In order to ensure that the "United Express" service was properly coordinated with United's nationwide service to hub airports, United had the contractual right to exercise substantial control over the services Mesa and WestAir provided to the public, the routes they flew, and the fares they charged. App. 2a.

In 1997, United replaced WestAir with SkyWest Airlines on eight routes flown out of Los Angeles. When WestAir and Mesa disputed United's right to make such changes, United filed this diversity action to obtain a declaration with respect to its contract rights. Subsequently, Mesa abandoned or reduced

the number of flights it flew on certain routes that it had an exclusive right to fly out of the Denver airport, claiming that it was losing too much money on those routes. United notified Mesa that it was in default under its contract. When Mesa failed to cure following receipt of that notice, United terminated its agreement with Mesa. Thereafter, WestAir's code-sharing agreement with United came to an end and was not renewed. App. 3a.

United amended its lawsuit to seek both a declaratory judgment that its actions in terminating Mesa were proper under the contract and damages for an alleged breach of that contract. Mesa and WestAir counterclaimed, also seeking damages for breach of contract. But Mesa and WestAir also brought tort claims against United under Illinois law seeking damages, including punitive damages, for alleged breach of fiduciary duty and fraudulent inducement. In addition, WestAir and Mesa brought a third-party claim against SkyWest for tortious interference. App. 4a.

Although Mesa and WestAir were expressly described as "independent contractors" in their contracts with United, they claimed that those contracts had somehow created a partnership or joint venture which allegedly imposed on United "fiduciary duties of care and loyalty implied in law." Mesa Counterclaim ¶ 69; WestAir Counterclaim ¶ 24. As the Seventh Circuit noted in its opinion, Mesa and WestAir claimed that these alleged fiduciary duties imposed "obligations on United that *override* the contract." App. 11a (emphasis in original). Thus, even if United had the contractual right to terminate its agreement with Mesa or to shift routes from WestAir to another carrier, Mesa and WestAir argued that "United had a fiduciary obligation to use its contractual powers for *their* economic benefit, rather than for its own, and that they are entitled to punitive damages because (in the language of their brief)

United attempted 'to terminate Mesa's rights and interests in the Partner Agreement for its own benefit and to Mesa's detriment.'" App. 12a (emphasis in original).[2/]

Mesa also sought damages under a fraud-in-the-inducement theory, claiming that United had defrauded it into incurring significant expenses (including buying certain aircraft at an allegedly inflated price) by promising to enter into an extended ten-year exclusive agreement with Mesa. Mesa admitted that United had in fact entered into such an extended agreement, which included the terms that United had allegedly promised. It was that agreement that United subsequently terminated. Mesa sought to use its fraud-in-the-inducement claim to hold United liable for terminating the agreement even if United had a contractual right to do so, on the ground that United had intended all along not to follow through on the promises it had made in the contract and had either misrepresented its own intentions or acted with "reckless disregard for their truth or falsity." Mesa Counterclaim ¶¶ 16-18, 59.

Finally, Mesa and WestAir filed a third-party complaint against SkyWest, claiming that SkyWest had induced United to breach its contracts with them by awarding SkyWest the right

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[2/] In his opinion for the Court, Judge Easterbrook expressed "skeptic[ism]" with respect to Mesa and WestAir's claims that their contracts created a partnership with United. App. 12a. The only basis Mesa and WestAir offered for that claim was that United referred to regional carriers as its flying "partners" and Mesa's code-sharing agreement is entitled an "Expanded Partner Agreement." As Judge Easterbrook noted, businesses "often refer to suppliers, customers, and producers of complementary products as 'our partners' without summoning up fiduciary duties." *Id.*

to become a United Express carrier on some of the same routes that WestAir and Mesa had been serving. Third-Party Complt. ¶¶ 14, 21. Petitioners claimed that SkyWest had induced the alleged breach by offering to transfer to United "at least two departure gates at LAX that SkyWest owned and United desperately wanted (and had been unable) to acquire." *Id.* ¶¶ 15, 20.

United and SkyWest moved for judgment on the pleadings on the tort counterclaims and the third-party complaint, on the ground that Mesa and WestAir were attempting to use state common law tort claims to effectively regulate airline decisions with respect to rates, routes or services and that those claims were therefore preempted by Section 105(a)(1) of the ADA. The district court granted the motion, but certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b). The Seventh Circuit granted leave to appeal on an interlocutory basis and affirmed.

In his opinion for a unanimous court, Judge Easterbrook concluded that this Court's decision in *Wolens* was controlling. He reiterated the Seventh Circuit's view in *Travel All Over The World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), that state law tort claims were preempted under *Wolens* if application of the state's rule would have a "significant economic effect" on airline rates, routes or services. The court found that the *Wolens* test was easily met in this case: the tort claims at issue here are "all about" "routes and divisions of revenues" and thus would "assuredly" "have a significant effect on air carriers' rates, routes or services." App. 14a.

The court rejected petitioners' claim that they were merely trying to use their tort claims to enforce the bargain United had made. Instead, it concluded that in their fraud and breach of fiduciary duty claims, petitioners were impermissibly

trying to use "external norms" supplied by state law to "change the parties' financial arrangements" and to "override" their contractual agreement. App. 11a. The court also upheld the dismissal of the third-party tortious interference claim against SkyWest, noting that such claims can "readily" be used to "get around contracts (or limits on the means of enforcing contracts)" and to "suppress competition, which would undercut the Airline Deregulation Act of 1978," which was designed to ensure competition in the airline industry. App. 14a.

Although the court felt constrained to rule as it did by *Wolens*, Judge Easterbrook also made it clear that allowing petitioners to proceed with their tort claims would be contrary to the purpose and policies behind the ADA. Noting that the case at bar involves regional service by Mesa and WestAir to multiple states, which United used to "construct through rates and routes for travel across many jurisdictions," he concluded that neither Illinois nor any other state had "much of a claim" as a source of tort law and that applying "the conflicting tort principles of 50 different states to these interstate and international transactions would make a mess of things." App. 15a. By contrast, finding such claims preempted served the ADA's purpose of promoting competition by allowing a system of voluntary agreements, with "nationally uniform overrides" supplied by the Department of Transportation, to "flourish." *Id.*

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit Properly Applied This Court's Decisions In *Morales* And *Wolens*.

This Court first addressed the ADA's preemption clause in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992). In that case, the Court held that an attempt by state attorneys general to use the states' general consumer fraud laws to enforce airline fare advertising guidelines promulgated by the National Association of Attorneys General was preempted. The Court explained that "[s]tate enforcement actions having a connection with, or reference to, airline 'rates, routes, or services,' are pre-empted" under the ADA. 504 U.S. at 383. That standard was met because the guidelines the attorneys general were attempting to enforce purported to establish binding requirements as to how tickets could be marketed if they were to be sold at particular prices. If an airline failed to abide by the guidelines, a consumer would have the right to sue for damages, "effectively creating an enforceable right to [a particular] fare." 504 U.S. at 388. The Court held that the "express references" to fares in the guidelines were sufficient, in and of themselves, to meet the "related to" requirement of the ADA. *Id.*

The Court then went on to hold that, in any event, "it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares." 504 U.S. at 388. The Court explained that the disclosure requirements set forth in the guidelines made it virtually impossible for airlines to widely advertise discounted fares that were subject to substantial restrictions; by significantly curtailing the airlines' ability to "market their product," the guidelines would have a significant — and hence prohibited — impact on the fares the airlines charged. 504 U.S. at 390. At

the end of its opinion, the Court observed that it was not holding that all state regulation of the "non-price aspects" of airline advertising was preempted. The Court recognized that some state actions "'may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have preemptive effect." *Id.* (brackets in original). But the Court found the guidelines at issue in *Morales* to be clearly within the scope of preempted state regulation and therefore declined to offer any guidance with respect to the outer limits of the preemption required by the ADA.

In *Wolens*, the Court addressed the question of what constitutes "enforcement" of a state law relating to airline rates, services or routes. The issue in *Wolens* was whether passengers disappointed with retroactive changes American Airlines had made in its frequent flyer program could sue the airline for damages for breach of contract and for alleged violations of the Illinois Consumer Fraud Act. Invoking the test adopted in *Morales*, the Court concluded that the plaintiffs' "complaints state claims 'relating to [air carrier] rates, routes or services." 513 U.S. at 225. The Court noted that "[p]laintiffs' claims relate to 'rates,' *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." 513 U.S. at 226. Having concluded that the plaintiffs' claims related directly to airline rates and services, the Court found it unnecessary to consider whether those claims also related *indirectly* to rates or services because they had a forbidden significant economic impact on either rates or services.

The Court then addressed the question of whether allowing plaintiffs to pursue their claims for damages under the Illinois Consumer Fraud Act and their breach of contract claims would constitute the impermissible enforcement of a state law

relating to air carrier rates, routes or services. The Court held that plaintiffs' consumer fraud claims were preempted because the imposition on airlines of state-created rules designed to prevent consumers from being deceived was contrary both to the text of the preemption clause and to the ADA's "purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." 513 U.S. at 228. The Court then held that the plaintiffs' breach of contract claims were *not* preempted because those claims did not allege any "violation of state imposed obligations," but rather sought "recovery solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. at 228.

The *Wolens* Court emphasized that the distinction it was making was fully consistent with the ADA's purpose to "promote 'maximum reliance on competitive market forces.'" 513 U.S. at 230. The Court stated that "[m]arket efficiency requires effective means to enforce private agreements" and that the "stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.'" *Id.* At the same time, however, the Court cautioned that state law could *not* be used to expand the bargain the parties had made:

> The ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with

> no enlargement or enhancement based on state laws or policies external to the agreement.

513 U.S. at 232-233.

In this case, the Seventh Circuit applied precisely the analysis required by *Morales* and *Wolens*. The court first determined that the claims at issue here "related to" airline rates, routes or services, both because they were "all about" rates, routes and services and because allowing petitioners to pursue those claims would plainly have a "significant effect" on rates, routes, and services. Apart from disparaging the *Morales* and *Wolens* test as unduly relying on the "literal language" of the statute, petitioners do not attack this portion of the Seventh Circuit's decision. Nor could they do so. As in *Morales*, giving Mesa and WestAir the right to sue for damages under a tort theory for their termination as United Express carriers on certain routes would "effectively creat[e] an enforceable right to" those routes as a matter of state law. 504 U.S. at 388.[3/]

In the second stage of its analysis, the Seventh Circuit considered the very same argument petitioners make in this Court: that their tort claims should be permitted as an adjunct to their breach of contract claims in order to enforce and

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[3/] Similarly, as the Seventh Circuit concluded, giving petitioners the right to sue SkyWest for tortious interference would "assuredly" have a significant effect on air carriers' rates, routes or services because it would suppress competition for regional routes by subjecting third parties to lawsuits based on a state's public policy with respect to the limits of permissible competition. App. 14a (citing *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999), which explains how the often unclear boundaries of the privilege to compete recognized in state tortious interference law may be used to suppress competition).

"protect" the sanctity of the parties' voluntary agreements. After carefully reviewing the nature of each claim asserted by petitioners, the Seventh Circuit rejected this argument. The court concluded that their fraud claim was "not by any stretch of the imagination a request to enforce the parties' bargains; it is a plea to replace those bargains with something else" and that their breach of fiduciary duty claims sought to impose on United "duties that *override* the contract." App.10a-11a (emphasis in original). The Seventh Circuit followed *Wolens* in holding that state law cannot be used in this fashion, to effectively regulate agreements with respect to airline rates, routes or services by "enlarg[ing] or enhanc[ing]" the bargain an airline voluntarily made "based on state laws or policies external to the agreement."513 U.S. at 233.

The Seventh Circuit also rejected petitioners' claim that their tortious interference claim was merely an attempt to protect the "sanctity" of their agreement with United: the court noted that such claims were often used to "get around contracts (or the limits on the means of enforcing contracts)" and therefore are "regularly treat[ed]" as preempted in labor law and that such claims serve to "suppress competition, which would undercut the Airline Deregulation Act of 1978." App. 14a.

Petitioners simply ignore the Seventh Circuit's rulings on these issues, repeating their argument that they are only trying to enforce and "protect" the bargains they made. Whether the Seventh Circuit properly characterized the particular tort claims made in this case, however, is not an issue that warrants review by this Court. Contrary to petitioners' dire predictions (Pet'n at 20), "injustice and anarchy" will not result in the marketplace for regional air carrier service if Mesa and WestAir are precluded from asserting state tort law claims in addition to their breach of contract claims. The courts remain

free to fully and completely enforce the terms of the parties' voluntary agreements. Moreover, as Judge Easterbrook observed, "[m]arket forces . . . constrain" the major carriers' "exercise of contractual powers": major carriers need efficient and reliable service from regional carriers who fly under code-sharing agreements in order to ensure that passengers will not shift to other major airlines who provide better connecting flights. App. 2a.

Petitioners' contention (Pet'n at 7) that the Seventh Circuit's decision precludes airlines from entering into enforceable partnership agreements should also be rejected. The Seventh Circuit was properly skeptical of petitioners' claim that the parties in this particular case in fact entered into a partnership arrangement, rather than an arm's length contractual relationship. App. 12a. Furthermore, the Seventh Circuit found that petitioners were trying to use state law concepts of fiduciary duty to *override* the explicit bargain the parties made — thus effectively using state law policies to regulate an agreement with respect to airline rates, routes and services. As the Seventh Circuit held, that kind of a breach of fiduciary duty claim is plainly preempted. But the Seventh Circuit's ruling says nothing about what the result would be in a case where it is apparent that two airlines entered into what both sides understood was a partnership agreement and one party was attempting to use concepts of fiduciary duty to interpret the agreement — rather than to override it. That situation was not presented here and should not be considered unless and until it arises.[4/]

[4/] Whether any type of fraudulent inducement claim could be asserted must also await another day. The Seventh Circuit noted that a claim of fraud in the inducement might well be proper when the allegedly defrauded party sought to rescind the agreement or restore

Petitioners also completely ignore the Seventh Circuit's conclusion that preemption is fully consistent with the policies and purposes of the ADA because applying the differing tort laws of the various states to the kinds of contractual relationships at issue here would "make a mess of things." App. 15a. As this Court recognized in *Wolens*, the market efficiency the ADA was designed to achieve depends on stability and certainty. But, as the Court also recognized, there can be no stability and no certainty if individual states are free to override the bargain the parties themselves made by imposing their own policies through the enforcement of state tort law claims. Similarly, the competition the ADA was designed to foster will not flourish if regional air carriers competing for code-sharing agreements are constrained by the conflicting and often ambiguous policies of the various states with respect to tortious interference.

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the status quo. App. 10a. All the court held was that the very odd fraud in the inducement claim asserted here — which was essentially a claim that United never intended to perform the agreement it entered into — was preempted because it was a transparent attempt to use state law policies external to the parties' agreement to alter the bargain they had struck with respect to United's right to terminate the agreement.

II. This Court Should Not Grant Certiorari To Reconsider Its Rulings In *Morales* And *Wolens*.

A. This Court's ERISA Preemption Cases Do Not Require A Reexamination Of The Standards For Preemption Under The ADA.

In *Morales*, this Court construed the phrase "relating to" in the ADA's preemption provision broadly. 504 U.S. at 383. In support of that broad construction, the Court relied on the plain meaning of the words themselves and on its prior decisions broadly construing the term "relating to" in ERISA preemption cases. *Id.* Based on that reading of the ADA preemption provision, the Court rejected the argument that only state efforts to prescribe airline rates, routes or services or to specifically regulate the airline industry were preempted. *Id.* at 385. Again citing ERISA cases, the Court concluded that "laws of general applicability" were preempted when applying them to an airline's conduct would have the "forbidden significant effect upon" rates, routes or services. *Id.* at 388. The Court recognized that other types of state regulation might affect airline rates, routes or services in too "'tenuous, remote or peripheral a manner' to have pre-emptive effect." *Id.* at 390. Inasmuch as the case before it did not present a "borderline question," the Court expressed no view as to where it would be appropriate to draw the line. *Id.*

Petitioners argue that subsequent ERISA cases have cut back on the breadth of the term "relating to" to such an extent that the Court should now reconsider its rulings in both *Morales* and *Wolens*. Petitioners suggest that the Court should reconsider whether ADA preemption should extend to laws of general applicability or whether it should be limited to state regulation aimed directly at airline rates, routes or services. Petitioners also urge the Court to reconsider the "significant

effect" test that the Seventh Circuit followed in this case, on the ground that the Court should move away from a "literal" interpretation of the ADA preemption provision, in favor of an interpretation that is focused entirely on the "policies" behind the ADA.

The recent ERISA cases do not provide a basis for reconsidering this Court's interpretation of the very different provisions of the ADA. The preemption provision in ERISA, by its very nature, presents a greater line-drawing challenge than the ADA, because it supersedes "any and all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). A "broad" interpretation of "relating to" in this provision could conceivably preclude the application of *any* state law to any employee benefit plan. In the cases petitioners cite, the Court has concluded that Congress did not intend to sweep so broadly and has instead looked to the objectives of the ERISA statute as a "guide to the scope of the state law that Congress understood would survive." *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). See also *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 519 U.S. 316, 329 (1997) (state law not preempted where the "indirect economic influence" of a state law of general application did not limit a plan administrator's choices and thus did not function as a regulation of the plan itself).[5/]

[5/] Petitioners miscite *Boggs v. Boggs*, 520 U.S. 833, 841 (1997), for the proposition that ERISA's preemption provision is limited to "those state laws that actually interfere with the purpose of the federal statute." In *Boggs*, the Court did hold that a Louisiana law was preempted because it conflicted with ERISA. But the Court then went on to observe that the conflict made it unnecessary to "inquire

Unlike its counterpart in the ERISA statute, the ADA's preemption provision does not purport to preempt the enforcement of all state laws "relating to" a particular kind of entity — such as "airlines." Instead, it singles out the enforcement of laws "relating to" particular subject matters — an airline's rates, routes or services. There may be interpretive questions as to what each subject matter entails (see Part B, *infra*), but once the scope of "rates, routes or services" is defined, there is simply not the same kind of confusion as to what was intended that the Court has wrestled with in the ERISA cases. In fact, to conclude that there is no preemption even though the enforcement of a state law would have a "significant effect" on an airline's rates, routes or services would require the Court to ignore the plain language of Section 105(a)(1) of the ADA.

In any event, as Judge Easterbrook pointed out in this case, this Court's most recent ERISA opinion in *Unum Life Ins. Co. v. Ward*, 526 U.S. 358 (1999), demonstrates that the Court has not deviated from the basic principles announced in *Morales* and *Wolens*. In *Unum Life Ins. Co.*, the Court concluded that a state law of general applicability with respect to agency relationships was preempted as applied to an ERISA plan because it would effectively "regulate the basic services that a plan may or must provide to its participants or beneficiaries." 526 U.S. at 379. *Unum Life Ins. Co.* is entirely consistent with this Court's holding in *Morales* that ADA preemption extends to laws of general applicability when the enforcement of those laws has the forbidden "significant effect" on airline rates, routes or services.

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whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim." *Id.*

B. The Cases Petitioners Cite From Other Circuits Do Not Create A Circuit Split Over The Scope Of The Term "Relating To" In Section 105(a)(1) Of The ADA.

Petitioners contend that the Court's ERISA cases have engendered confusion in the lower courts with respect to the scope of ADA preemption, which this Court should grant their petition to resolve. In support of that argument, petitioners cite the Second Circuit's decision in *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77 (2d Cir. 1997), the Third Circuit's decision in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998), and the Ninth Circuit's *en banc* decision in *Charas v. TransWorld Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998); they also refer to, without citing by name, the Fifth Circuit's decision in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (Pet'n at 12 n.9).

It is clear that there is a conflict between the Ninth Circuit's *Charas* decision and the Fifth Circuit's *Hodges* decision. But that conflict concerns the proper definition of the word "services" in Section 105(a)(1) of the ADA. In *Hodges*, the Fifth Circuit held that a state law personal injury claim could be preempted if it arose out of an airline's policy of providing (or not providing) a particular service, but that a claim arising out of the allegedly wrongful *manner* in which the service was provided was not preempted. 44 F.3d at 336. In *Charas*, the Ninth Circuit expressly rejected this distinction, holding that the term "services" should not be applied at all to passenger services, but rather should be limited to "such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." 160 F.3d at 1265-66.

Northwest Airlines has recently filed a Petition for Certiorari asking the Court to resolve this conflict in a case by airline employees seeking damages for exposure to second-hand smoke on flights to Asia. See *Northwest Airlines, Inc. v. Duncan*, No. 00-404. Even if the Court grants Northwest's petition, however, it should not grant the petition in this case or hold it for the disposition of the Northwest case. Unlike *Charas*, *Hodges* or the *Northwest Airlines* case, this case does not present any issue with respect to the proper definition of "services." Indeed, even under the Ninth Circuit's restrictive definition of that term, the tort claims at issue here would relate to airline routes and services, because they directly relate to "such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." 160 F.3d at 1265-66.

The Second Circuit's decision in *Abdu-Brisson* also does not create any conflict with this case. At issue in *Abdu-Brisson* was a claim made by Delta pilots that some of its seniority rules and other employment conditions violated state and local age discrimination laws. Delta did not argue — nor could it argue — that the claims in that case directly concerned its rates, routes or services. Instead, Delta argued that any change in the employment conditions at issue in the lawsuit would have a significant economic impact on its prices and thus would "relate" indirectly to those prices.[6/] The Second Circuit held that Delta had not proved that there would be any substantial effect on prices, routes or services if the state and local antidiscrimination laws were applied to it. 128 F.3d at 85. Without such proof, the court concluded that the supposed state

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[6/] Delta also argued that changes in its work rules sought by the plaintiffs would disrupt relations on the flight deck and thus have an adverse impact on its "services."

interference was too tenuous, remote or peripheral to be deemed "related to" prices, routes or services. *Id.* at 86. Other courts have followed the same reasoning in cases where employees seek damages against airlines under state anti-discrimination laws. See *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463 (11th Cir. 1998); *Wellons* v. *Northwest Airlines, Inc.*, 165 F.3d 493 (6th Cir. 1999).

Abdu-Brisson is not in conflict with the case at bar, where the Seventh Circuit properly concluded that application of state tort laws to petitioners' claims would have the requisite "significant effect" on an airline's rates, routes and services. Moreover, *Abdu-Brisson* clearly presented a borderline situation, testing the limits of the "related to" concept. The fact that the Second Circuit expressed some frustration concerning the lack of a bright-line test to decide how to draw the appropriate line is hardly a reason for granting certiorari in *this* case, where (as in *Morales* and *Wolens*) the claims relate directly to an airline's rates, routes or services.

Finally, the Third Circuit's decision in the *Taj Mahal* case also does not create the kind of conflict that requires resolution by this Court — even though the *Taj Mahal* court expressly declined to follow the Seventh Circuit's decision in *Travel All Over The World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), and the Seventh Circuit in this case rejected the test proposed by the Third Circuit in *Taj Mahal*. Like *Abdu-Brisson*, the *Taj Mahal* case involved what was clearly a borderline situation. The plaintiff in that case was a travel agency that sued an airline for defamation for giving explanatory letters to passengers whose tickets were not honored because they were apparently stolen. The travel agency claimed that the letters implied that it had knowingly trafficked in stolen goods. The airline sought dismissal of the defamation claim on the ground that it was preempted by the ADA. The

Third Circuit held that it was not, in the process suggesting that the test of ADA preemption was "whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation." 164 F.3d at 194.

In its opinion in this case, the Seventh Circuit rejected the Third Circuit's test. Judge Easterbrook read the *Taj Mahal* opinion as creating a two-part test, under which a state tort claim would be preempted either if its application frustrated the purpose of the ADA or it imposed public-utility style regulation. App. 8a.[7/] The Seventh Circuit refused to adopt this more limited test, concluding that under *Morales* and *Wolens*, a claim is preempted if either "the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have a significant economic effect upon them. App. 9a (emphasis in original; internal quotations omitted).

Although there is undoubtedly a difference between the formulations adopted by the Third and Seventh Circuits, there is no reason to believe that these different formulations will yield different results. In fact, in *Travel All*, the Seventh Circuit reached exactly the same conclusion that the Third Circuit did in *Taj Mahal* with respect to a travel agency's virtually identical claim for defamation as a result of statements an airline allegedly made about its business practices. The Seventh

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7/ Judge Easterbrook's reading of the *Taj Mahal* opinion was plainly the correct one. In applying the new test it articulated to the particular facts before it, the Third Circuit made it clear that the test was disjunctive, holding that there was no preemption because "[a]pplication of state law [to plaintiff's defamation claim] does not frustrate Congressional intent, *nor* does it impose a state utility-like regulation on the airlines." 164 F.3d at 195 (emphasis added).

Circuit agreed that such a defamation claim was *not* preempted because it did not relate at all to the airline's rates, routes or services, but rather related only to the travel agency's alleged business practices. 73 F.3d at 1433.[8/]

The lack of any conflict in the conclusions the Third and Seventh Circuits have reached with respect to specific claims and the great disparity between the type of claim at issue in *Taj Mahal* and the type of claim at issue here both counsel against granting the Petition. Future cases may show that the differences between the two Circuits are more apparent than real. In any event, the Court should wait to see whether a clear conflict in results develops.

III. This Case Does Not Provide A Proper Vehicle For Resolving Whatever Conflicts May Exist.

Even if the Court concludes that there are conflicts that should ultimately be resolved or that it should undertake the line-drawing exercise the Court eschewed in *Morales*, this case does not provide an appropriate vehicle to do so. The case is

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[8/] Petitioners also cite the *Taj Mahal* court's conclusion that punitive damages are not preempted by the ADA, claiming that this too constitutes a conflict with the Seventh Circuit's decision in *Travel All*. Pet'n at 10 n.7. But nothing in *Travel All* suggests that a party suing an airline is prohibited from obtaining punitive damages with respect to a tort claim that is *not* preempted. Instead, in *Travel All*, the Seventh Circuit held that the plaintiff could not seek punitive damages on a breach of contract claim that related to airline services (and hence fell within the scope of the ADA's preemption provision) because, although claims to enforce the parties' voluntary agreement survived, any attempt to enhance the parties' bargain by seeking punitive damages was precluded under *Wolens*. *Travel All*, 73 F.3d at 1432 n.8.

still at an interlocutory stage. Thus, subsequent events may well moot the need to make any final decisions in this case.

Moreover, the claims at issue here do not resemble any of the cases petitioners cite, where the lower courts faced personal injury or employee claims or claims that are clearly at the periphery of what might legitimately be considered preempted. Unlike *Charas* and *Hodges*, there is no question in this case about the scope of the term "services" and how that term relates to personal injury claims. Nor is this a borderline case, where the Court could offer guidance as to where the line should be drawn between claims that are preempted and those that are too tenuously related to airline rates, routes or services to fall within the scope of Section 105(a)(1) of the ADA. The tort claims in this case relate directly to airline rates, routes and services and, as the Seventh Circuit concluded, would plainly have a "significant economic effect" on rates, routes and services. As a result, those claims should be preempted no matter what test is applied.

As the Seventh Circuit properly concluded, allowing petitioners to pursue their tort claims in this case would "make a mess of things," subjecting airlines to confusing and conflicting state regulation of their decisions regarding service to be provided, routes to be flown, and rates to be charged. App. 15a. In *Wolens*, this Court recognized that state regulation through the imposition of tort liability is just as clearly prohibited as direct public utility-style regulation would be. The various states could not purport to regulate the contractual relationships between major and regional carriers by, for example, limiting the right of major carriers to terminate regional carriers. It necessarily follows that state tort policies cannot be used, as petitioners sought to do in this case, to achieve the same result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1, 2000

(3)

No. 00-496

IN THE

Supreme Court of the United States

Mesa Airlines, Inc. and WestAir Commuter Airlines, Inc.,

Petitioners,

v.

United Airlines, Inc. and SkyWest Airlines, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONER

The Respondents' Brief in Opposition, which addresses, in the main, the merits of the Seventh Circuit's decision, itself raises several interesting issues, each one of which represents an additional reason for this Court to grant Petitioners' writ of certiorari.

1. Respondents note that Northwest Airlines has recently filed a petition for certiorari also asking this Court to resolve the conflicts in the federal circuits respecting the interpretation and application of the ADA's preemption provision. *See Northwest Airlines, Inc. v. Duncan*, 208 F.3d 1112 (9th Cir. 2000), *petition for cert. filed* (U.S. Sept. 13, 2000)(No. 00-404). In that particular litigation, which involves a health/personal injury issue, Northwest is seeking to overturn a Ninth Circuit decision which, it believes, construed ADA preemption in too *narrow* a fashion. Is this not a strong indication that the scope of ADA preemption is an issue on which there is a great deal of controversy and dispute on both ends of the spectrum, and on which there exists a great and pressing need for guidance and direction from this Court?

2. Respondents assert that the claims at issue clearly "relate to" airline "rates, routes or services." This may be true with respect to the *subject matter* of the private contract in dispute; and not surprisingly, given that the contracting parties are themselves airlines. However, does this not lead to resolving the more difficult questions of whether Petitioners' attendant

business tort claims "relate to" routes in the manner contemplated by Congress in its deregulation of the airline industry, and whether such a linguistic analysis is even of assistance in ascertaining that Congressional intent?

3. Respondents make reference to the ADA's "savings clause," which Judge Easterbrook claimed "does not carve any domain from the scope of [ADA preemption]." App. 5a. However, if the savings clause has no impact on the contours or substance of ADA preemption, what intended purpose *does* it have?

4. Respondents refer to Judge Easterbrook's conclusion that Petitioners' tortious interference with contract claim would "suppress competition, which would undercut the Airline Deregulation Act of 1978." App. 14a. However, could Congress have intended that what has been historically and traditionally considered as "wrongful" competition be nevertheless protected, and even encouraged? And is not such a conclusion even more troublesome, when one considers that Petitioners are now left with no claim or private remedy whatsoever against Respondent SkyWest Airlines (the alleged wrongful competitor)?

5. Although Respondents echo Judge Easterbrook's assertion that Petitioners' breach of fiduciary duty claim necessarily implicates "rules external to the parties' bargain," App. 12a, does not this argument "assume[ ] the answer to the very contract construction issue on which [Petitioners'] claims turn," *American Airlines, Inc.*

v. Wolens, 513 U.S. 219, 234 (1995), *i.e.*, whether Petitioners and United in fact had contractually agreed to be bound by traditional partnership principles?

6. Although Respondents cite Judge Easterbrook's concern over the possible conflicting standards embodied in the common law of the 50 states, would not the same argument apply to *any* tort claim brought against an airline, regardless of whether it fell within the intended statutory scope of "rates, routes or services"? Would this not result in a total preemption of all state tort claims? *See Somes v. United Airlines, Inc.*, 33 F.Supp.2d 78, 84 (D. Mass. 1999). Moreover, are not airlines already subject to differing standards of conduct with respect to "generally applicable tax, environmental, or blue sky laws, which as a general matter are not preempted under the ADA"? *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77, 84 (2nd Cir. 1997). And at any rate, is not the partnership law which forms the basis of Petitioners' breach of fiduciary duty claim, and which is embodied in the Uniform Partnership Act, similar to contract law, in that neither is "diverse, nonuniform, [or] confusing"? *Wolens*, 513 U.S. at 233 n. 8 (internal cite omitted).

The above issues, which are all subsumed in Petitioners' "Questions Presented For Review," are part and parcel of the enormous confusion and uncertainty concerning the intended contours and limits of the ADA's preemption provision, a conflict which is open and acknowledged in the federal circuits. As Justice

Ginsburg stated in *Wolens*, the pivotal issue is: "[W]here is it proper to draw the line . . . between what the ADA preempts, and what it leaves to private ordering, backed by judicial enforcement?" 513 U.S. at 234. In the case at bar, these preemption issues arise in the context of commercial business dealings between airlines—a setting far removed, and which we submit presents far more difficult preemption and policy issues, from those considered by the Court in *Morales*[1] and *Wolens*.

CONCLUSION

This case represents an altogether appropriate and timely opportunity for the Court to revisit the issue of ADA preemption, so as to clarify the proper avenue of analysis in light of the Court's recent ERISA jurisprudence, and to address the admittedly difficult application of those principles in the burgeoning world of inter-airline partnerships and collaborative ventures. Accordingly, Petitioners respectfully request that their writ of certiorari be granted.

Respectfully submitted,

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[1] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).